

EXHIBIT 20

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 COMMODITY FUTURES TRADING COMMISSION,

4 Plaintiff,

5 v.

22 Civ. 4563 (AKH)

6 GEMINI TRUST COMPANY, LLC,

7 Defendant.

8 -----x
9 New York, N.Y.
10 February 13, 2023
11 2:45 p.m.

12 Before:

13 HON. ALVIN K. HELLERSTEIN,

14 District Judge

15 APPEARANCES

16 U.S. COMMODITY FUTURES TRADING COMMISSION

17 Attorneys for Plaintiff

18 BY: ANDREW J. RODGERS

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25 BY: JOHN F. BAUGHMAN

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30 BY: CHRISTOPHER L. LAVIGNE

31 ANDREW C. BOSSE

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1 (Case called)

2 THE COURT: I think the defendant is making the first
3 request for production that has been objected to. The
4 defendant will go first.

5 Let me announce the appearances.

6 For the plaintiff, Andrew Rodgers?

7 MR. RODGERS: Good afternoon, your Honor.

8 THE COURT: Brent Tomer.

9 MR. TOMER: Good afternoon, your Honor.

10 THE COURT: Alejandra de Urioste.

11 MS. DE URIOSTE: Good afternoon, your Honor.

12 THE COURT: David Oakland.

13 MR. OAKLAND: Good afternoon, your Honor.

14 THE COURT: Katherine Rasor.

15 MS. RASOR: Good afternoon, your Honor.

16 THE COURT: Anybody left in CFTC Washington?

17 That was a joke. Sorry.

18 The defendant, John Baughman.

19 MR. BAUGHMAN: Good afternoon, your Honor.

20 THE COURT: Andrew Bosse.

21 MR. BOSSE: Good afternoon, your Honor.

22 THE COURT: Daniel Schwartz.

23 MR. SCHWARTZ: Good afternoon, your Honor.

24 THE COURT: Vivian Fine.

25 MS. FINE: Good afternoon, your Honor.

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1 THE COURT: Christopher LaVigne.

2 MR. LAVIGNE: Good afternoon, your Honor.

3 THE COURT: Mr. Baughman, you're up.

4 MR. BAUGHMAN: Good afternoon, your Honor.

5 I'm going to address all but the last item that the
6 defendants raised. My colleague, Mr. LaVigne, will deal with
7 the last one which concerns search terms.

8 I'm going to talk about the major issues here which
9 are a dispute whereby the CFTC is not producing significant
10 information, and we are moving to compel and would like to
11 order them to produce all the information they have withheld.

12 To explain, if I may, I want to take a moment and step
13 back a little bit and explain what the case is about and why
14 the information we seek is so important. The CFTC's claim in
15 this case was that during something called a self-certification
16 process in 2017, our client Gemini made false statements to the
17 CFTC and that those false statements had the capacity and, in
18 fact, did influence the CFTC's decision-making process. That's
19 their theory and they pleaded it in the complaint.

20 I direct your Honor to multiple paragraphs in the
21 complaint, such as 39, 60, 71, 78, 92. But in particular, I
22 would like to draw your Honor's attention to paragraph 124 of
23 the complaint, where they plead that the alleged false
24 statements, "prevented the Commission from having a true
25 picture from which to evaluate the product during this

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1 self-certification."

2 Well that is their burden. They need to prove that
3 there were false statements and they will need to prove that
4 those false statements were material. So a core issue in the
5 case that the jury will have to decide, your Honor, is what
6 constitutes a material misstatement to the government.

7 But the good news, your Honor, is that the Supreme
8 Court has defined it for us, and it is undisputed what the
9 standard is in a case called *Neder v. United States*, N-e-d-e-r,
10 which both parties cite, in both cites parties recite the
11 standard numerous times. The standard is this, a false
12 statement is material if it "has a natural tendency to
13 influence or is capable of influencing the decision of the
14 decision-making body to which it is addressed."

15 THE COURT: Is that any different from *Basic v.*
16 *Levinson*?

17 MR. BAUGHMAN: Well, yes. *Basic v. Levinson* would be
18 whether something is material to a reasonable investor.

19 The key difference here in cases with statements to
20 the government is to which it is addressed, and what the cases
21 very clearly hold, your Honor, is that materiality is addressed
22 from the perspective of the listener.

23 Let me read to you from the case *United States v.*
24 *Raza*, where the court held, when the victim is the government,
25 materiality is evaluated "by reference to the particular

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1 government agency or public official that was targeted."

2 I'll give you another example in a well-known case in
3 this courthouse, *United States v. Litvak*. Mr. Litvak was
4 convicted of making a false statement to the treasury
5 department. The Second Circuit reversed finding that "there
6 was no evidence that Litvak's misstatements were reasonably
7 capable of influencing a decision of the treasury."

8 So this is important. Materiality depends on the
9 audience. It's not what a reasonable Uber driver thinks. It's
10 not what a reasonable investor thinks. It's not what a
11 reasonable juror thinks. The question is what would the CFTC
12 in this circumstance thinks is important.

13 THE COURT: So you're arguing that materiality is not
14 an objective concept?

15 MR. BAUGHMAN: That is incorrect, sir, we are not.
16 There is a bit of a miscommunication. I agree that it is
17 objective. The question is objectively were the statements
18 capable of influencing the CFTC.

19 THE COURT: And if that's an objective standard, that
20 must be judged by the words alone.

21 MR. BAUGHMAN: I disagree, your Honor. Completely not
22 true. What matters is what is the evidence that would go to
23 this question, and there are many, many cases --

24 THE COURT: We're not talking about relevance. We're
25 talking about materiality.

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1 MR. BAUGHMAN: Correct.

2 THE COURT: We are talking the level. If it's
3 objective, it's measured by the words themselves.

4 MR. BAUGHMAN: I do not believe that --

5 THE COURT: May I finish my comment, please?

6 MR. BAUGHMAN: Of course.

7 THE COURT: If it has to do with the effect on the
8 individual, we're talking about reliance. And the individual
9 administrator, whether he relies on a misstatement or not, is
10 not an issue, it's whether the words themselves are capable of
11 influencing the decision. And that is an objective standard.

12 MR. BAUGHMAN: I agree it's an objective standard,
13 your Honor, but this is critical to our case. We must be able
14 to present evidence that goes to that question. They are going
15 to call witnesses and they are going to come in and say, well,
16 I'm the CFTC, and it would have been very important for us to
17 know this, that, or the other thing.

18 THE COURT: I don't think so.

19 MR. BAUGHMAN: If they --

20 THE COURT: I don't think they can call witnesses on
21 that issue.

22 MR. BAUGHMAN: Well, they have done that through the
23 investigation that they brought and that is what they pled.

24 THE COURT: But the investigation is not what's before
25 me.

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1 MR. BAUGHMAN: Your Honor, there is very good case law
2 holding that if the question is whether or not something can
3 influence the decision-maker, evidence that it did or did not
4 is relevant to the question of whether or not it can.

5 I'll cite to you, for example, the *United States v.*
6 *Gerrans* case, which we cited in our papers, which puts this
7 very simply. In that case, the question was whether a false
8 statement to an FBI agent was capable of influencing the FBI.
9 And the court held, well, obviously it was capable of
10 influencing the FBI because it did. There was evidence that it
11 did.

12 And right now, your Honor, we have absolutely no
13 evidence, we have been denied entirely all evidence --

14 THE COURT: Let's not get to that point yet. I'm
15 still dealing with the standard.

16 MR. BAUGHMAN: OK.

17 THE COURT: Let me hear what the CFTC says about that.

18 Mr. Rodgers.

19 MR. RODGERS: Thank you, your Honor.

20 The cases are uniform that the standard is objective.
21 They are uniform in the cases that we cited and they are
22 uniform in the cases that defendants cited. They are trying --

23 THE COURT: What does it mean by the statement that
24 they must prove materiality by reference to the particular
25 government agency or public officials that were targeted?

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1 MR. RODGERS: Your Honor, that is easily satisfied
2 here because defendants made the statements that they made in
3 connection with the self-certification to the CFTC. That is
4 not a loophole to graft on some subjective element to
5 materiality.

6 THE COURT: But, in other words, is it a different
7 standard as to the CFTC than it is to, say, somebody else?

8 The SEC, for example?

9 MR. RODGERS: Well, the statute is slightly different.
10 You know, the statute that we are bringing these charges under
11 requires that the defendant know or should have known that
12 their statements were false and misleading at the time that
13 they made them.

14 THE COURT: Now how do you intend to prove that?

15 Are you going to bring witnesses, or is there going to
16 be an examination of the words that were used?

17 MR. RODGERS: I think it's both, your Honor. There
18 are the words that the defendants stated to the CFTC, and then
19 there is what --

20 THE COURT: Are they in writing or oral?

21 MR. RODGERS: Both, your Honor. But --

22 THE COURT: So the oral words won't necessarily
23 require a witness, but will the witness go on to say why he or
24 she was misled?

25 MR. RODGERS: The witness would articulate whether

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1 that specific statement, you know, had an impact on their
2 evaluation of the bitcoin futures contract. There is no
3 question really that the statement that was made --

4 THE COURT: I don't know. I don't think so.

5 If you say yes, that the government allowed discovery,
6 but I don't think that's true. I don't think you're going to
7 be able to prove that that way. I don't know that I would
8 allow it. If it's subjective measurement, it's measured by the
9 words themselves.

10 Now if it's written, we don't need any testimony. But
11 if it's oral, we will need testimony as to what was said,
12 examination and cross-examination and maybe several witnesses.
13 But those witnesses will not be allowed to say whether he or
14 she was influenced or not or why.

15 If you tell me otherwise -- I haven't examined this
16 issue, but if you tell me otherwise, I'm going to allow the
17 discovery.

18 MR. RODGERS: Your Honor, our understanding is that
19 the materiality turns on what defendants -- the statements that
20 defendants made in the context of the self-certification. The
21 internal thinking of the CFTC is completely irrelevant to that
22 determination.

23 THE COURT: I agree, but you're dodging what I'm
24 saying.

25 If anybody is going to be offered for the proposition

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1 that I was influenced and this is why, I will allow the
2 discovery to the defendants. If I'm going to make that
3 determination from the words themselves, I will not.

4 MR. RODGERS: Understood, your Honor.

5 THE COURT: You tell me.

6 MR. RODGERS: It's a little difficult to parse in the
7 abstract, but what I would say --

8 THE COURT: No, it's not. Not at all.

9 MR. RODGERS: I mean, for the purposes of the
10 standard, our position is that it's an objective standard and
11 that, you know, witnesses can talk about, you know, how the
12 statements were relayed.

13 THE COURT: That's correct, and discovery will be
14 limited to that. But I will not allow the witnesses to go on
15 to say why I was influenced or what influenced me.

16 MR. RODGERS: Understood, your Honor.

17 THE COURT: OK. With that understanding, what's the
18 defendants' position?

19 MR. BAUGHMAN: Your Honor, do you have a copy of the
20 complaint with you?

21 THE COURT: Yes, I do.

22 MR. BAUGHMAN: Could I actually ask you to look at it?

23 THE COURT: I'm looking at it.

24 MR. BAUGHMAN: OK, because --

25 THE COURT: I'm looking at it. I read very carefully

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1 what you read out to me.

2 MR. BAUGHMAN: I would just give you, for example,
3 another example.

4 THE COURT: That does not mean that every allegation
5 in the complaint is relevant.

6 MR. BAUGHMAN: Understood, your Honor.

7 I just want to give one further example. Paragraph
8 71, for example. OK. Such false and misleading statements and
9 omission to the commission --

10 THE COURT: If you want me to follow you, let me get
11 it.

12 MR. BAUGHMAN: Of course, your Honor.

13 THE COURT: I have it.

14 MR. BAUGHMAN: Paragraph 71 reads, such false or
15 misleading statements and omissions to the commission staff
16 were material, including to the evaluation of the compliance
17 with acting commission regulations of the bitcoin futures
18 contractor.

19 I respectfully submit, your Honor, that under the
20 ruling that you have just said, they can't prove that. I do
21 not think they should be allowed to call a witness to say
22 whether they considered this statement, if the statement had
23 any impact at all.

24 THE COURT: I just said that.

25 MR. BAUGHMAN: OK. As long as it's clear that there

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1 will be no evidence of the impact of the statement on the CFTC.

2 THE COURT: Well, probably you may need an expert on
3 this issue, because if it's an objective standard, I must judge
4 it according to the words that were said.

5 MR. BAUGHMAN: Respectfully, your Honor, might I be
6 given two minutes to try to persuade you otherwise?

7 THE COURT: Where do you want to go?

8 MR. BAUGHMAN: Here's the thing. The 55-mile-an-hour
9 speed limit is an objective standard, but whether or not it has
10 been breached requires evidence. And in this case they will
11 need, to meet their burden, they are going to need to produce
12 evidence that the statements were capable of influencing the
13 CFTC.

14 THE COURT: I don't agree.

15 MR. BAUGHMAN: I do believe that's what they will have
16 to prove in order to prevail in their case, your Honor. If
17 that is so, I'm entitled to present a defense.

18 I feel odd arguing for my adversary, but if they can't
19 prove materiality, then the case is over.

20 THE COURT: The letter to me says there is little case
21 law dealing with materiality. Federal courts have reached
22 uniform understanding of the materiality concept. You cite
23 *Raza*, and there is no problem with that.

24 Then you say their burden is to prove materiality by
25 reference to the particular government agency or public

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1 officials that were targeted. That was my discussion with
2 Mr. Rodgers, and my proposition is that this has to be judged
3 by the ones themselves and it becomes a matter of law whether
4 it will not affect someone. Whether, in fact, it did affect
5 someone or did influence someone is not relevant.

6 MR. BAUGHMAN: Respectfully, your Honor, I believe the
7 Supreme Court has held that materiality is a mixed question of
8 law in fact, and it is not whether or not the statements were
9 material, your Honor, I respectfully submit is not something to
10 decide on summary judgment. I believe it is a matter that must
11 go to the jury.

12 THE COURT: Well, it's true if the Supreme Court has
13 said that.

14 MR. BAUGHMAN: Pardon me?

15 THE COURT: It's true that the Supreme Court has said
16 that, but I don't know about the application.

17 MR. RODGERS: Your Honor, I would just note here --

18 THE COURT: Mr. Rodgers, what do you say?

19 MR. RODGERS: -- the Supreme Court has squarely
20 addressed this issue of materiality in *U.S. v. Gaudin*. That's
21 the case that I know we at least cited.

22 THE COURT: Where is it?

23 MR. RODGERS: Well, it's 515 U.S. 507.

24 THE COURT: Where is it in your papers?

25 MR. RODGERS: If we did cite it, it's from *Neder*.

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1 I want to direct your attention to --

2 MR. BAUGHMAN: I don't believe that's in the letter,
3 your Honor.

4 THE COURT: Could you hold yourself there?

5 MR. RODGERS: If it's not in the letter, your Honor, I
6 would ask request that I can read to you this brief comment
7 because it squarely addresses this issue of what it takes to
8 demonstrate materiality in the context --

9 THE COURT: What's the name of the case?

10 MR. RODGERS: United States v. G-a-u-d-i-n. That's
11 515 U.S. 506. I'm quoting from page 509. The court held
12 deciding whether a statement is material requires the
13 determination of at least two subsidiary questions of purely
14 historical fact. What statement was made and what decision the
15 agency was trying to make --

16 MR. BAUGHMAN: Exactly.

17 MR. RODGERS: -- that is how materiality is
18 determined. It's historical facts. It has nothing to do with
19 the internal machinations of the CFTC and how the material did
20 or did not affect that decision.

21 THE COURT: That's how I understand the law that is
22 stated and I was trying to state in my discussion with you.
23 That makes it an objective standard, and we don't get into the
24 question how the particular individual was or was not
25 influenced. That's my ruling.

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1 MR. BAUGHMAN: Your Honor, respectfully, you are
2 making it impossible for us to defend ourselves in this case.

3 THE COURT: Maybe you don't have a defense.

4 MR. BAUGHMAN: Your Honor, we do.

5 Look, both sides have said in their papers that they
6 would like, perhaps, the opportunity to address this further,
7 but it needs to be absolutely clear your Honor's ruling is, if
8 you're denying the discovery, they are not allowed to present
9 any evidence of how, when, where, under what circumstances
10 anyone at the CFTC considered these statements. That has to be
11 entirely off the record. They cannot even call someone to say
12 I listened carefully. It has to be 100 percent out of the
13 case.

14 THE COURT: I haven't examined all the different
15 phrases that you've made, but I think that's probably so.
16 That's probably so.

17 Now let's put it a different way. A statement is
18 made. What is self-certification, Mr. Rodgers?

19 MR. RODGERS: It's the process by which a designated
20 contract markets list new products. It's one of two methods,
21 and they provide a detailed summary of the product after
22 considerable back and forth within the division of market
23 oversight within the CFTC, and ultimately they submit a letter
24 to the CFTC certifying that it complies with the Commodities
25 Exchange Act, including the core principals that govern the

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1 appropriateness of listing of those contracts and ten days
2 after the self-certification. Unless the CFTC moves to stay or
3 request additional information, that contract is then listed
4 for trading.

5 THE COURT: Now tell me about how you prove that.

6 MR. RODGERS: Those are --

7 THE COURT: I guess you prove what was asked and what
8 was answered.

9 MR. RODGERS: Your Honor, the record of the back and
10 forth with the defendant and the designated contract market are
11 a matter of historical record with re-mails and submissions and
12 the like.

13 THE COURT: Right, right. And beyond that, there
14 would be no testimony.

15 MR. RODGERS: I mean, it will take a second to unpack
16 that, but what I would say there needs to be testimony on, you
17 know, I think, like your Honor referenced, expert testimony on
18 the statutes and regulations that apply.

19 THE COURT: No, that's for me. I'm the judge. I'm
20 supposed to know that stuff. You can all make-believe that I
21 know this stuff, but it's my job to know this stuff, and I
22 don't take an expert to tell me what the law is. This is all
23 in the Code of Federal Regulations.

24 MR. RODGERS: Yes, I would agree with that. It's a
25 matter --

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1 THE COURT: So public rules and regulations, so the
2 letters, are there oral requests here too, oral conversations,
3 or just written?

4 MR. RODGERS: There was both, your Honor.

5 THE COURT: Both oral and written.

6 So, again, we have to say, what is relevant here is
7 what was said to the other side. Not what a person thought to
8 say or not what a person planned to say, what a person actually
9 said, just like in a contract. The objective expectations of
10 the parties that govern in a contract, same here.

11 So the element of factual discovery goes into how the
12 record was made up, not why the record was made up.

13 MR. RODGERS: I would agree, your Honor.

14 THE COURT: Good. Given that, where are we,
15 Mr. Baughman?

16 MR. BAUGHMAN: Well, the next item in the letter
17 related --

18 THE COURT: Am I finished with one?

19 MR. BAUGHMAN: Item one was the materiality.

20 THE COURT: We're finished with that. OK.

21 MR. BAUGHMAN: I mean, I would just like to say,
22 obviously I disagree with your Honor's ruling. I think I
23 understand --

24 THE COURT: I imagine that, yes. You're pretty clear
25 you disagree.

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1 MR. BAUGHMAN: We will respect the court and proceed
2 and figure it out as we go.

3 THE COURT: Let's put it this way.

4 MR. BAUGHMAN: It's a jury trial. This is a jury
5 trial.

6 THE COURT: I know you've asked for a jury and the law
7 provides for a jury, but there are no facts for a jury. There
8 may not be a jury trial. It depends how it works out. I don't
9 know.

10 MR. BAUGHMAN: Of course.

11 THE COURT: If there is a dispute as to who said what
12 and when, that's a jury issue.

13 MR. BAUGHMAN: Understood, your Honor.

14 The next item in our letter concerned the so-called
15 assertion of two privileges, the deliberative process privilege
16 and the investigative files privilege.

17 THE COURT: Do we get into that with what I said
18 before?

19 MR. BAUGHMAN: I don't know, your Honor. I can't tell
20 because the privilege log that they have given us is a page and
21 a half, so I can't really understand whether there are
22 documents that would go beyond the materiality point. I just
23 don't know.

24 MR. RODGERS: Your Honor, the privilege log is more
25 than a page and a half.

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1 THE COURT: Mr. Rodgers, I think you need to wait.

2 MR. RODGERS: Sorry, your Honor.

3 MR. BAUGHMAN: Your Honor, here is my point. They
4 have the burden of establishing these privileges, the
5 deliberative process privilege and --

6 THE COURT: I understand your point about privilege
7 log. Let's see what Mr. Rodgers has to say.

8 MR. BAUGHMAN: But there is an additional point.

9 MR. RODGERS: I'm sorry, your Honor. I didn't mean to
10 rudely interrupt.

11 THE COURT: Why don't you make that in a minute.

12 Go ahead, Mr. Rodgers.

13 MR. RODGERS: I'm sorry about that.

14 In any event, our privilege log is not a page and a
15 half. It's several pages. We detailed --

16 THE COURT: It doesn't matter how long it is. The
17 question is whether it's complete.

18 MR. RODGERS: Fair enough. There is no question --

19 THE COURT: Is it complete?

20 MR. RODGERS: It's complete with respect to the
21 communications in connection with the self-certification, and
22 then we did also do a categorical log for certain
23 communications within the department, you know, the division of
24 enforcement in connection with the investigation.

25 So the short answer -- and I apologize for rambling --

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1 is that yes, our privilege log is complete. We have detailed
2 all of the internal communications that we are withholding on
3 the basis of the deliberative process privilege.

4 MR. BAUGHMAN: May I, your Honor?

5 THE COURT: Mr. Baughman.

6 MR. BAUGHMAN: They have not complied with the law.
7 Both sides have cited cases. For example, *In Re Sealed Case*,
8 856 F.2d --

9 THE COURT: We're not talking about the law. We're
10 talking about a privilege log.

11 MR. BAUGHMAN: Your Honor --

12 THE COURT: And in what respects is a privilege log
13 not adequate?

14 MR. BAUGHMAN: In order to assert the deliberative
15 process privilege and the investigative files privilege, there
16 is a prerequisite before you get to the log, it is this. The
17 law is absolutely clear that there are three requirements that
18 must be met. The head of the department having control over
19 the requested information must make the assertion of privilege
20 personally based on an individual personal review of each of
21 the requested items and they have to submit a statement to the
22 court as to why the privilege is claimed with an explanation of
23 why it is properly asserted.

24 They have not done that. They admit they did not do
25 it. They have a footnote in their letter saying, well, if the

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1 order asks us to do it, we want more time to do it. There was
2 a discovery schedule, your Honor. They have a burden of
3 asserting privileges. They admit that this is the law. They
4 cite the cases and admit it's the law, and they didn't follow
5 it.

6 In my view, your Honor, they have waived the right to
7 assert the deliberative process privilege and the investigative
8 files privilege. I will cite to your Honor the case of
9 *DJM Investments, Inc. v. New York Futures Exchange, Inc.*,
10 224 F.R.D. 133.

11 THE COURT: I'm not prepared, in a 227 case, to rule
12 there is any waivers. If there is a waiver, something missing,
13 it can be corrected.

14 MR. BAUGHMAN: OK, your Honor, but they didn't follow
15 the law and they've asked for further briefing.

16 THE COURT: All right. Let me ask Mr. Rodgers. It's
17 true that the head of agency has to assert the privilege,
18 right?

19 MR. RODGERS: Your Honor, there are procedural
20 requirements that, you know, would be followed if we were
21 asserting this in connection with a briefing on the matter. We
22 can get the certification in a matter of three days.

23 THE COURT: This was a briefing. This was supposed to
24 be done. What do you need to do?

25 MR. RODGERS: We would request sufficient time --

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1 THE COURT: What do you need to do?

2 MR. RODGERS: We need to submit it to the commissioner
3 for approval.

4 THE COURT: What else?

5 MR. RODGERS: That's it, your Honor.

6 THE COURT: So the commissioner, in effect, has to
7 call the privilege?

8 MR. RODGERS: Well, they --

9 THE COURT: Invoke the privilege?

10 MR. RODGERS: That's correct.

11 THE COURT: OK.

12 MR. RODGERS: Or somebody delegated by him.

13 THE COURT: How long would it take?

14 MR. RODGERS: We would request sufficient time, but we
15 could do it in three days, your Honor.

16 THE COURT: Three days?

17 MR. RODGERS: I'm sorry. A couple weeks, your Honor.
18 I apologize. I misinterpreted what my colleague said.

19 THE COURT: How much time do you want?

20 MR. RODGERS: Three weeks, your Honor.

21 THE COURT: Three weeks.

22 What's three weeks from now, Alexander?

23 LAW CLERK: March 6.

24 THE COURT: March 6, 2023.

25 Next.

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1 MR. BAUGHMAN: Your Honor, I have other points on the
2 privilege. I will reserve them until we get the log. It will
3 make more sense.

4 THE COURT: Let's see what we can finish today. That
5 will be coming soon.

6 MR. BAUGHMAN: I agree. That's what I'm saying.

7 I will not argue further on the privilege point until
8 we get the log. So with that, I will pass to Mr. LaVigne,
9 which is our other item which had to do with search terms and
10 custodians.

11 THE COURT: We are finished with two then?

12 MR. BAUGHMAN: And three as well, your Honor, because
13 they are both privileges. It's different privileges but the
14 same.

15 THE COURT: I agree with you.

16 Now we're with plaintiff's positions, right?

17 MR. BAUGHMAN: No, your Honor. Not quite, we had one
18 more.

19 THE COURT: What page?

20 MR. LAVIGNE: Your Honor, it's page 18.

21 MR. BAUGHMAN: Page 18 of the letter, your Honor.
22 It's issue five on page 19 to 23 of the joint letter.

23 THE COURT: OK.

24 MR. LAVIGNE: Your Honor, the issue here, and we're
25 raising a search term dispute with your Honor because we've

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1 been asking the CFTC for weeks, if not months, to run certain
2 search terms and to negotiate about them in good faith. They
3 have not done so.

4 Candidly, your Honor, it's emblematic of something we
5 have been dealing with in connection with this case where they
6 are asking us to produce scores and scores and scores of
7 documents, go back to the well, and in exchange they are not
8 giving us what we're entitled to.

9 I'll just briefly summarize for your Honor. We filed
10 our request for production in early August 2022. Two months
11 later they sent us back a search protocol.

12 THE COURT: Let's cut to the quick. I take it the two
13 bullet points on the bottom of page 20 are what's at issue?

14 MR. LAVIGNE: Not exactly, your Honor. There are two
15 different issues. Number one is we have asked them to run
16 about 50 search terms or so, and that is Exhibit G in our
17 letter. The search terms, I can give your Honor a little bit
18 of a flavor, but they focus on key parties that are involved in
19 the case, key players involved in the case, and also key terms.

20 The CFTC says, for example, that the statement Gemini
21 made about this being a prefunded exchange or a fully reserved
22 exchange is misleading.

23 THE COURT: Haven't you mind what I held in the
24 earlier part of our discussion, how many of these search terms
25 would you still push to pursue, assuming I make consistent

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1 rulings?

2 MR. LAVIGNE: I'm sorry, your Honor. I didn't quite
3 catch that.

4 THE COURT: Having in mind the rulings I made earlier
5 and what is material and what's not, how many of these search
6 terms would you pursue, assuming I rule consistently?

7 MR. LAVIGNE: Your Honor, I would like to pursue all
8 of them. The issue, frankly, is they are relevant because they
9 go to the statements that the CFTC claims we made were false
10 and misleading. Their position is they have run certain terms
11 like Gemini, bitcoin futures, that suffices.

12 I don't believe that's right. The issue is relevance.
13 They are relevant in terms of burden, your Honor. We have been
14 asking them to run these terms and to provide us with
15 essentially a parse search term report so we can see what, if
16 any, of these terms are actually driving a number of the hits,
17 and they have never done that.

18 It's three months since we've submitted our request
19 and they have not given us back a search term hit report.

20 THE COURT: Maybe there is a difference in law.

21 MR. LAVIGNE: I don't believe it's a difference in
22 law, your Honor, because our terms are narrowly tailored to the
23 issues in the case.

24 THE COURT: Well, what do you say, Mr. Rodgers?

25 MR. RODGERS: Well, I guess it won't be surprising, we

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1 disagree with that perspective.

2 THE COURT: I can't hear you.

3 MR. RODGERS: Your Honor, we disagree with that
4 perspective. I think in the letter that they sent to us with
5 the discovery terms, as well as in the letter to your Honor,
6 it's pretty clear they are seeking material outside the
7 confines of this specific self-certification. They are looking
8 for information relevant to other self-certifications that may
9 have occurred at the same time.

10 THE COURT: Yeah, that's what I said. That's not
11 going to be relevant.

12 MR. LAVIGNE: Your Honor, respectfully, that's not
13 accurate. If you look at Exhibit I, which is our letter, the
14 terms we're using are people who are involved in this
15 certification, terms related to this certification that they
16 claim --

17 THE COURT: I have to get to the particular points
18 that you're making. I want to get the document up.

19 Exhibit G?

20 MR. LAVIGNE: It is Exhibit G, your Honor.

21 THE COURT: All right. What in Exhibit G shall I look
22 at?

23 MR. LAVIGNE: Sure. If you look at page eight out of
24 nine, appendix A.

25 THE COURT: I'm at page eight.

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1 MR. LAVIGNE: If you look at these parties, it lists
2 CBOE, OCC. These are all parties that were involved in this
3 specific certification. The names are individuals from CBOE,
4 who actually interacted with the CFTC in connection --

5 THE COURT: Who is CBOE?

6 MR. LAVIGNE: CBOE is the Chicago Board of Options
7 Exchange. That's the entity that listed this contract.

8 THE COURT: What's the relevance of all their
9 interactions?

10 MR. LAVIGNE: All these interactions, the CFTC is
11 claiming that false statements were made during the course of
12 this back and forth, and we want to see what the CFTC
13 actually --

14 THE COURT: Statements can only be made by something
15 you said, not by something somebody else said. So what
16 Reinsteins said to Deters is of no value whatsoever.

17 MR. LAVIGNE: Your Honor, I do think there is value in
18 it.

19 THE COURT: No. Complete hearsay.

20 MR. LAVIGNE: What, your Honor?

21 THE COURT: Hearsay.

22 MR. BAUGHMAN: Hearsay.

23 THE COURT: Have you ever heard of hearsay?

24 MR. LAVIGNE: Yes. I don't believe it's hearsay, your
25 Honor. I believe part of that does go to materiality and does

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1 go to the overall evaluation --

2 THE COURT: No, it does not.

3 MR. LAVIGNE: -- of the self-certification process.

4 THE COURT: It does not.

5 Materiality, misstatements, they are all measured by
6 what the defendants said, not by what others said about what
7 the defendants said.

8 I rule in favor of the CFTC. Anything else you want
9 me to rule on?

10 MR. LAVIGNE: Well, your Honor, there were also
11 additional custodians in connection with this, you know, back
12 and forth over search terms. There was a member of the
13 investigative team from the CFTC enforcement side. We think he
14 should be a custodian.

15 THE COURT: Why?

16 MR. LAVIGNE: Well, from my perspective, FBI agents
17 frequently interact with witnesses on the procedure points of
18 contacts with the witnesses. And this CFTC investigator, we
19 have the same concerns about not including him.

20 THE COURT: You don't know of any managed like that.

21 And who is going to be a witness here?

22 I mean, just cut down the scope of witnesses.

23 MR. LAVIGNE: Well --

24 THE COURT: I don't see it.

25 MR. LAVIGNE: -- your Honor, in order for the CFTC to

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1 establish that certain of the statements were false -- I mean,
2 if I can just elaborate for a second. They say our statement
3 that the exchange was prefunded was false. In order to
4 establish that as false, they are going to try to introduce
5 evidence and testimony from third parties who were involved in
6 a lending program, for example. That's going to require
7 witnesses who contest --

8 THE COURT: Is that right, Mr. Rodgers?

9 MR. RODGERS: I don't think that third-party testimony
10 would dispute the existence of a related party lending program
11 that was undisclosed.

12 THE COURT: You're not speaking clearly.

13 MR. RODGERS: I apologize, your Honor.

14 The third-party lending program is not subject to
15 dispute. It existed. It was a related entity to Gemini. All
16 of Gemini's employees are aware of it. They have told us that,
17 so the idea that that would require --

18 THE COURT: Are you going to produce these witnesses?

19 Are you going to use these witnesses?

20 MR. RODGERS: Well, the witnesses, you know, the
21 standard here does turn on what the Gemini knew or should have
22 known when they made the statements to the CFTC. We would be
23 entitled to information related to that under the charged
24 offense.

25 THE COURT: Yes.

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1 MR. LAVIGNE: Your Honor, for them to prove their case
2 and your Honor asked about hearsay, if they want to share that
3 a statement about a prefunded exchange was somehow misleading,
4 they are going to have to introduce testimony from percipient
5 witnesses talking about the alternative lending programs that
6 were utilized. And they have already interviewed witnesses, I
7 will submit, they likely will intend to call.

8 THE COURT: Tell me what these witnesses would say.

9 MR. LAVIGNE: I think the witnesses would say, for
10 example, that there was -- I mean, you would have to ask the
11 CFTC. But the CFTC may have witnesses come in and say that
12 there was a third-party affiliate. The third-party affiliate
13 lended bitcoin and lended to certain entities that were then
14 encouraged to trade bitcoin on the exchange. From our
15 perspective, that in no way, shape, or form is inconsistent
16 with prefunding.

17 THE COURT: They are saying that involvement of an
18 affiliated company doesn't show the reliability of the
19 exchange. They are saying that if you want to prove that there
20 is financial responsibility, you can't use one party's
21 transactions with a related party.

22 MR. LAVIGNE: Your Honor, from our perspective --

23 THE COURT: It's not the same thing you're saying.

24 Am I right, Mr. Rodgers?

25 MR. RODGERS: I have to admit, I'm a little lost on

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1 this thread. This is so far afield of the search terms we're
2 talking about. I'm a little --

3 THE COURT: It's not far afield. This is a
4 justification. Mr. LaVigne says that in order to prove
5 falsity, you've got to prove what one third party did with
6 another because they are related, and I understand from the
7 papers that that is the case because you want to show that
8 there is no reliability, no financial liability to an
9 interparty transaction. I don't see the point of testimony on
10 this.

11 MR. LAVIGNE: Your Honor, that's for the CFTC. If
12 they want to --

13 THE COURT: No, it's for me. It's for me.

14 MR. LAVIGNE: Your Honor, from my perspective, if the
15 CFTC comes up here and tries to prove their case with one
16 agent, like the U.S. Attorney's office would with an FBI agent,
17 and have that agent summarize everything in the case --

18 THE COURT: That's not happening.

19 MR. LAVIGNE: It's not happening. If they want to
20 show --

21 THE COURT: It's not happening here.

22 MR. LAVIGNE: I understand that. If they want to
23 show --

24 THE COURT: That's what happens in investigations. It
25 doesn't happen here.

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1 MR. LAVIGNE: OK. I respect that.

2 I don't know if -- I hope my adversary appreciates
3 that, but if they --

4 THE COURT: I don't care if he does or not. I make
5 the rulings.

6 MR. LAVIGNE: I understand that, your Honor. My point
7 is this: They conferred with a lot of third parties in
8 connection with this case.

9 THE COURT: I would think so.

10 MR. LAVIGNE: They did all this. We want to ensure we
11 have the universe of that.

12 THE COURT: So you can't get the universe of what they
13 did in their investigations. You can get the universe of what
14 is relevant to the case.

15 MR. LAVIGNE: Well, I want --

16 MR. RODGERS: If it's helpful, your Honor, we produced
17 all third parties materials to the defendant, all parties that
18 we received from third parties in connection --

19 THE COURT: Talk to Mr. LaVigne.

20 MR. RODGERS: I'm sorry.

21 THE COURT: I'm talking to Mr. LaVigne. I don't see
22 the point here.

23 MR. LAVIGNE: OK. Your Honor, I understand that. But
24 we have had extensive back and forth with the CFTC. I have
25 concerns that there are third-party witnesses who they are

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1 going to call, and oftentimes an investigator --

2 THE COURT: I will guarantee you this. There will not
3 be a single witness who will be called who you will not have a
4 chance to depose on the potential subjects of his testimony.

5 MR. LAVIGNE: I appreciate that, your Honor.

6 We also want to make sure we have the witness's
7 documents.

8 THE COURT: You want what?

9 MR. LAVIGNE: The witness' documents
10 contemporaneous --

11 THE COURT: The witness' documents are the same
12 subject, bounded by relevance. You get it all. You're
13 entitled to it all. If the CFTC wants to use a witness, you
14 have to know about that, and you are entitled to take the
15 witness's deposition and get the documents related to his
16 testimony.

17 MR. LAVIGNE: I understand that, your Honor.

18 A big thing --

19 THE COURT: What is needed to be done is for the CFTC
20 to tell you who are its witnesses.

21 MR. LAVIGNE: Right. That hasn't happened and we
22 also --

23 THE COURT: I know it hasn't happened. Maybe that's
24 the next step.

25 I think you're finished with discovery. It was

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1 supposed to be finished January 23. We're ready for the next
2 step.

3 MR. LAVIGNE: I think understanding who the CTFC's
4 witnesses are would be a very important first step, frankly.

5 THE COURT: I agree.

6 MR. LAVIGNE: We also want the notice of the witness
7 interviews they had with those witnesses.

8 THE COURT: No. No, you're not getting that.

9 MR. LAVIGNE: Your Honor, the government also turns
10 that over in criminal cases.

11 THE COURT: Well, this is not a criminal case. You
12 can take discovery of these people.

13 MR. LAVIGNE: I understand that, your Honor. We think
14 given who some of the potential witnesses may be, it's very
15 critical that we get that.

16 THE COURT: Well, you will know who the witnesses are
17 and you can take discovery of those witnesses, but you can't
18 encroach on what they found out. You have to ask your own
19 questions.

20 All right. What are you saying, Mr. Rodgers?

21 MR. RODGERS: Nothing to add on that point other than
22 the three points that we raised in our letter, if we're ready
23 to move on to that.

24 THE COURT: All right. We're finished with that. I
25 finished. I rule against the additional search terms.

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1 All right. Let's take up your points, Mr. Rodgers.

2 MR. RODGERS: No problem, your Honor. The first issue
3 in our joint letter is that --

4 THE COURT: Where am I? What page?

5 MR. RODGERS: Let me get that for you. It starts on
6 page 23.

7 THE COURT: OK. Give me a minute, please.

8 OK. Thank you.

9 MR. RODGERS: Your Honor, around the time of writing
10 the letter, we did not have a status update on defendant's
11 production. On February 9th last week we received a letter
12 from defendant along with a list of search terms that they
13 agreed to produce. We're reviewing that at the moment, and
14 our request here is that we have leave to bring any further
15 disputes with respect to the search terms that were run in the
16 previous --

17 THE COURT: You have leave. I want discovery
18 finished. It was supposed to be finished last month.

19 MR. RODGERS: Understood, your Honor.

20 We were precluded from being able to do that because
21 we did not receive the final production or an update on where
22 things stood on that production until last Thursday.

23 THE COURT: In other words, you've got nothing to tend
24 to me now?

25 MR. RODGERS: There are a couple. One, I think, main

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1 issue with respect to the search terms that were run and the
2 productions that were made is that defendants agreed to run a
3 searches across two key custodians, key witnesses, and that
4 does not appear to be the case.

5 We haven't had an opportunity to meet and confer on
6 this issue. That is one primary issue, and we understood that
7 these two individuals would be custodians.

8 THE COURT: All right. How long will it take to
9 finish discovery?

10 MR. RODGERS: Your Honor, we would need, just back of
11 the envelope, two weeks to understand what has happened with
12 respect to the letter and potentially meet and confer.

13 THE COURT: Two weeks to learn what happened with the
14 letter?

15 MR. RODGERS: I'm sorry. I apologize, your Honor. We
16 would request two weeks in which time we can meet and confer to
17 get any questions answered with respect to the final production
18 that we received.

19 THE COURT: Then you'll produce a letter to me?

20 MR. RODGERS: If there was an issue that needed
21 resolving, your Honor.

22 THE COURT: OK. Do we have any further conferences
23 scheduled?

24 Do we have one for Friday?

25 MR. RODGERS: Your Honor, I think the anticipation was

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1 we would discuss that at the end of this hearing.

2 THE COURT: Yeah, I don't think we're ready. What I
3 would like to do is move on to the next stage and define what
4 that's going to be.

5 Are you planning to use any experts?

6 MR. RODGERS: Yes, your Honor.

7 THE COURT: So we need to get involved in that.

8 So you should talk to defendants about experts and
9 they should talk with you about experts, and we should define
10 how many experts there are going to be because I'm going to cut
11 them down.

12 MR. RODGERS: Yes, your Honor. We can do that.

13 THE COURT: It may be that you want to have experts on
14 materials that are not really materials for an expert.

15 MR. RODGERS: Understood, your Honor.

16 THE COURT: When should I meet with you again?

17 MR. BAUGHMAN: Your Honor, might I make a suggestion?

18 THE COURT: Yes, Mr. Baughman?

19 MR. BAUGHMAN: I think it might be beneficial if,
20 following the rulings today, we meet and confer. We can
21 propose a joint letter to you, a joint status proposed schedule
22 agreed between the parties, or if you want to put us on the
23 calendar for this Friday or next Friday, we can come back.

24 THE COURT: No, I don't want to put you on the
25 calendar until you're ready.

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1 MR. BAUGHMAN: Why don't we confer and agree to submit
2 a --

3 THE COURT: I need another date for control purposes
4 on my calendar.

5 MR. BAUGHMAN: There was discussion earlier of March 6
6 for them to comply with the requirements of doing the privilege
7 log, the assertion of the privilege. I believe that would be a
8 Monday.

9 Why don't you put us on the calendar for the following
10 Friday, which I think would be March 10. Does that make sense?

11 MR. RODGERS: We think that makes sense, your Honor.

12 In terms of discovery-related, we have two other
13 discovery-related issues that may be helpful.

14 MR. BAUGHMAN: Actually, your Honor, I just realized
15 my wife booked a vacation that week. Could we have the
16 following Friday so I don't run and need a lawyer for other
17 purposes?

18 THE COURT: Let me have the calendar here.

19 What day would you like?

20 MR. BAUGHMAN: I'm proposing maybe it would be
21 March 17 would be the following Friday, your Honor.
22 Information would be provided on the 6th and then two Fridays
23 later would be the 17th, I believe.

24 THE COURT: I would rather keep it during the week. I
25 want this on the record, and what I do on Fridays is not on the

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1 record.

2 MR. BAUGHMAN: Then the following Monday or Tuesday.

3 THE COURT: Yes. Let's see.

4 March 22 at 11, is that OK?

5 MR. BAUGHMAN: Yes, your Honor.

6 MR. RODGERS: That will work for us, your Honor.

7 THE COURT: All right. March 22 at 11. March 22 at
8 noon.

9 OK. Anything else I can do for you?

10 MR. RODGERS: Your Honor, there were two other
11 outstanding discovery issues that we raised in our letter. One
12 involves laptops of two former employees. These are the same
13 witnesses that were supposed to be custodians. These laptops
14 were turned over to the SDNY in connection with a potential
15 prosecution.

16 We're asking that they be turned over to us so we can
17 image them. The defendant has declined to do that.

18 THE COURT: Do you need a new order?

19 MR. RODGERS: I'm sorry, your Honor?

20 THE COURT: What do you want?

21 You want the U.S. Attorney to give you --

22 MR. RODGERS: No. We would like the defendants to
23 turn over the laptops. They disclosed that they possessed them
24 at the end of discovery.

25 THE COURT: Why?

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1 MR. RODGERS: They relate to two of the key witnesses
2 in this case. There is no basis for privilege information and
3 they are custodians that have not been reviewed and searched.

4 THE COURT: I'm not going to give you a laptop. This
5 is not a criminal case.

6 MR. RODGERS: Well, we would like the material on the
7 laptop, your Honor.

8 THE COURT: You're not going to get a laptop.

9 MR. RODGERS: Can we get an order requiring that the
10 materials be reviewed and turned over on the laptop?

11 THE COURT: By you?

12 MR. RODGERS: That would be our preference.

13 THE COURT: You can ask for what is relevant, and if
14 it's in the laptop, there's an obligation to turn it over.

15 MR. RODGERS: Well, your Honor, that is what we would,
16 you know, request in the first instance, at the very least, is
17 that we get the relevant material from the laptops.

18 MR. BAUGHMAN: Your Honor, two points.

19 Counsel maybe hasn't had a chance to digest. He keeps
20 saying these two witnesses are not custodians. They are. We
21 have agreed to produce the witnesses' documents.

22 And what your Honor has just proposed, we offered to
23 them. We offered to run their search terms on the computers

24 THE COURT: That's sufficient, Mr. Rodgers?

25 MR. RODGERS: If they are willing to do that, we'll

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1 accept that.

2 THE COURT: OK.

3 MR. RODGERS: Hopefully that will be done before the
4 next deadline.

5 MR. BAUGHMAN: With one caveat, your Honor, I just
6 want to get on the record, which is at least one of the
7 computers is encrypted and we don't have the password. We're
8 trying to find it. But if we can get access, we will do it. I
9 will undertake to do it.

10 THE COURT: Next.

11 MR. RODGERS: The final issue, your Honor, is we
12 requested a privileged log for settlement communications
13 related to the same two witnesses. We understand that
14 defendants have engaged in settlement communications related to
15 a separate matter with one of the two witnesses.

16 THE COURT: This bears on credibility?

17 MR. RODGERS: It bears on his credibility as well as
18 potential bias and prejudice. And there is at least two
19 instances of settlement-linked affidavits that were either --
20 that are going to be used or were potentially going to be used
21 in this matter. We flagged for your Honor some of our concerns
22 around these settlement discussions.

23 THE COURT: Can we make this less abstract?

24 What are these witnesses going to say?

25 MR. RODGERS: These witnesses are former employees of

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1 Gemini, one of which I want to be careful here because the
2 witness is subject to certain protections within the CFTC based
3 on their status as -- I want to be careful -- a whistleblower.
4 We can't really come out and name them in open court.

5 THE COURT: Well, how are you going to deal with the
6 problems of discovery?

7 MR. RODGERS: Excuse me?

8 THE COURT: How are you going to deal with the
9 problems of discovery?

10 MR. RODGERS: There is a protective order and the name
11 has been relayed and, you know, frankly, it's been published by
12 defendant. We want to be respectful and mindful of the program
13 that we have at the CFTC. This individual was deeply involved
14 in the related-party loans as well as the rebate programs that
15 were not disclosed, so they are -- and the other individual who
16 reported to him -- both key witnesses in this case, both of
17 which have been --

18 THE COURT: Who made the settlement?

19 MR. RODGERS: Defendants have settled with one of the
20 individuals, and the individual who I'm not going to name did
21 not execute an affidavit, even though he was offered a monetary
22 component to the settlement in exchange for the affidavit.

23 THE COURT: He did not produce an affidavit?

24 MR. RODGERS: The affidavit was drafted by counsel and
25 sent to him. He declined to sign it.

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1 THE COURT: All right. Which counsel sent him an
2 affidavit?

3 MR. RODGERS: Counsel at counsel's table, your Honor.

4 THE COURT: He declined to sign it, so why is it
5 relevant?

6 MR. RODGERS: Well, your Honor, the statements -- we
7 think it's relevant because it potentially raises issues with
8 respect to engagement with a witness.

9 THE COURT: We're not dealing with obstruction of
10 justice, are we?

11 MR. RODGERS: Your Honor, there is a potential that,
12 you know, that -- I'll just say it. There's a potential
13 witness tampering concern on our part.

14 THE COURT: Well, it's not before me, is it?

15 MR. RODGERS: Your Honor, it doesn't have to be in
16 connection with this specific --

17 THE COURT: This is not a motion to recuse defense
18 counsel. If demanded and the man didn't sign it, it's not
19 relevant.

20 MR. RODGERS: I'm not going to argue with you on that
21 point, your Honor. We understand your ruling.

22 THE COURT: Anything else?

23 MR. RODGERS: No, your Honor.

24 THE COURT: Anything else, Mr. Baughman?

25 MR. BAUGHMAN: No, your Honor. Thank you very much.

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1 THE COURT: All right. So I'll see you guys March 22,
2 noon. Can we stay on the record a few more minutes, please?
3 What is it that the CFTC wants in the end? What's the remedy
4 it wants?

5 MR. RODGERS: Your Honor, we're seeking injunctive
6 relief, but also a civil monetary penalty in connection with
7 false statements that were made.

8 THE COURT: How is this penalty measured?

9 MR. RODGERS: It's per statement, your Honor, is my
10 understanding.

11 THE COURT: Is this criminal or civil?

12 MR. RODGERS: It is civil, your Honor.

13 THE COURT: Supreme Court said something about this,
14 hasn't it, about civil monetary penalties?

15 MR. TOMER: Your Honor, if I may, that was with
16 respect to discouragement under the SEC's statute. The civil
17 monetary penalty remains a civil penalty. It is a penalty,
18 however.

19 THE COURT: I guess is there a standard of proof of
20 preponderance?

21 MR. TOMER: Correct, your Honor.

22 THE COURT: Any comment, Mr. Baughman?

23 MR. POSNER: No, your Honor.

24 THE COURT: OK. Thank you.

25 (Adjourned)